No. 81-2257

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In the Supreme Court of the United States

OCTOBER TERM 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

This brief amicus curiae is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 245,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case, as viewed by the Chamber—the extent to which a federal regulatory agency may, in purported pursuit of its regulatory mission, bar access of business entities and others to state courts—is of major importance to Chamber members.

PRELIMINARY STATEMENT

The Chamber is not concerned here with the merits of the labor disputes between the petitioning restaurant and its employees. Nor is the Chamber concerned with the merits of the issues of Arizona law which petitioner sought to raise in its civil action in the Superior Court of the State of Arizona.

What does deeply concern the Chamber, however, is what appears to be the attempted usurpation by the NLRB

of state court jurisdiction over even admittedly state court issues such as libel. In the name of, or under the guise of, enforcing the federal labor laws, the NLRB is making preliminary judgments as to whether a respondent's civil suit against employees or others is, or may be, meritorious. If the Board, which has no expertise in such local law matters, concludes, without regard for what the state court's views may be, that the respondent's suit is not "reasonably based" or does not have "colorable merit," it then attributes improper motives to the respondent plaintiff and orders it to withdraw its complaint in the civil suit.

That is what happened here. The petitioner, a respondent in an NLRB proceeding, has been ordered by the Board to withdraw the complaint which it filed against certain of its employees in the Superior Court of the State of Arizona. The Court of Appeals for the Ninth Circuit has enforced this order of the Board.

Because the Chamber believes this case to exemplify an alarming pattern of attempted limitations on the free access of its members to state court judiciaries by federal administrative fiat, we are filing this amicus brief. When non-preempted state law issues are precluded from being litigated in a state court by action of a federal agency, it is our view that the concept of preemption has been stood on its head. We urge this Court zealously to safeguard the authority of our state judicial systems. We further urge that this court carefully circumscribe the authority of federal regulatory agencies, if indeed it finds any such authority exists, to decide under what circumstances a citizen may be denied access to those state judiciaries. It is the Chamber's view that if, as the Board here suggests, the petitioner has abused state court processes, the determination of that fact and the providing of a remedy therefor should be the function of the state courts, not the NLRB.

We will not, in this *amicus* brief, attempt an elaborate factual statement. The detailed facts have been presented by the parties in their respective briefs supporting the petition for certiorari and the opposition thereto. Doubtless they will again be presented in the briefs of the parties which will be filed, now that the writ has been granted.

For purposes of this *amicus* brief suffice it to note that the state court suit, the filing of which by the employer plaintiff against certain of its employees, has here been found by the NLRB to violate the National Labor Relations Act as amended, sought injunctive relief and damages for the following:

(1) Certain acts engaged in by the picketing employee defendants, which plaintiff alleged constituted mass picketing, violence, trespass, and improper obstruction of plaintiff's driveways, all alleged to be contrary to the common and/or statutory law of the State of Arizona; and

(2) Certain leaflets distributed by the employee defendants, which plaintiff alleged contained: (a) false statements about the proceedings pending before the NLRB; (b) false statements that plaintiff's employees had been denied proper overtime pay, were subjected to unwanted sexual advances and were compelled to use a "filthy restroom . . . with no soap, paper towels or toilet tissue provided." Such statements in the leaflets were alleged to be maliciously false and violative of the common law of Arizona relating to libel.

In the unfair labor practice proceeding which resulted in the order challenged in this Court, the Administrative Law Judge found that the evidence presented to *him* was insufficient to support the allegations made in the court suit regarding mass picketing, violence, trespass, and obstruction of driveways. He also found that the evidence

presented to *him* was insufficient to support the libel suit because the statements in the leaflets were, upon his analysis of the evidence, not "misrepresentations."

Having thus analyzed the evidence, the Administrative Law Judge concluded that the plaintiff employer did not have a reasonable basis for its lawsuit. Having so found, the Administrative Law Judge further concluded that the suit was filed as a penalty for filing charges with the NLRB and as a penalty for picketing. This, then, was found to be a violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

Apparently both the state court in Arizona and the Federal District Court in Phoenix were less peremptory in their treatment of the plaintiff employer's claims. While the state court judge denied a preliminary injunction, he had initially, after hearing, issued a temporary restraining order, and the hearing on the permanent injunction has yet to be held. With respect to the libel count, the state court denied the defendants' motion for summary judgment, ruling that there were factual issues requiring a hearing for resolution. Upon the Board's petition for §10(j) relief in this case, the District Court found no reasonable cause to believe that petitioner's state court suit was coercive, discriminatory, or filed for illegal objectives.

SUMMARY OF ARGUMENT

1. The NLRB is not the proper forum to determine the merits of actions brought in state court under state law.

2. To the extent that the subject matter of a state court action may be preempted by federal labor law, the NLRB may either (a) seek to intervene, as a party or in an *amicus* capacity, and present the preemption issue at a proper point in the state court proceeding, or (b) in ap-

propriate cases, seek a federal court injunction enjoining enforcement of the state court order, if it improperly impinges upon the area preempted by federal labor law regulation, *NLRB* v. *Nash Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971). These established means for adjudicating preemption issues are both orderly and adequate. To permit such issues to be decided in the NLRB's unfair labor practice procedures would sanction an unwarranted and improper usurpation by a federal regulatory agency of the proper jurisdiction of the state and federal judiciaries.

3. If the state court action is in an area such as libel, which is not preempted, then the NLRB should not be permitted to impede access to the state courts. The only permissible exception might be in those cases in which the state court action directly attacks a defendant's utilization of the NLRB's processes, such as an action alleging that charges filed with the Board are motivated by fraud or malice. That narrow exception to the rule that the NLRB should leave non-preempted state court issues to the state court system for determination should be re-examined in an appropriate case, but surely should not be expanded to encompass the kind of state court action involved in this case.

4. The statutorily prescribed administrative procedures for remedying unfair labor practices offer neither an appropriate nor effective forum for dealing with allegations of abuse of state court processes, even if such abuses are claimed to interfere with federal regulation of labor disputes.

ARGUMENT

A. Suits Involving State Law Should Be Determined By The State Courts

It would seem axiomatic that the appropriate forum for interpreting and applying the common and statutory law of a state ought to be the courts of that state. That is the very *raison d'etre* for the existence of state judiciary systems. If a further rationale is needed, one need only note that by regular, continuing exposure to issues of state law, the state courts become and remain the only truly expert judiciary in such matters.

Conversely, an Administrative Law Judge employed by the National Labor Relations Board has quite a different area of expertise. His regular and continuing exposure is to issues of interpretation and application of the provisions of the National Labor Relations Act. He becomes expert in the precedents concerning those issues as established by decisions of the National Labor Relations Board, the Courts of Appeal and this Court. His expertise lies in those areas. Only on the rarest of occasions does such an Administrative Law Judge come into contact with state statutes or with the common law of any state. Such a judge is, therefore, ill equipped to decide issues of state law.

At the outset of our analysis here, then, it would seem reasonable to begin with the premise that except for constitutional or policy reasons of overriding importance, the Board's Administrative Law Judges ought not usurp the functions which are properly those of the judicial systems of the several states.

It is just as important, from the standpoint of orderly judicial administration and sound public policy, that state courts be left with the authority and the primary responsibility for interpreting and applying state law, as it is for the National Labor Relations Board to retain the primary authority and responsibility for interpreting and applying the regulatory provisions of the National Labor Relations Act.

B. Questions Of Preemption Are Best Left In The First Instance To The State Courts Or, If Necessary, To The Federal District Courts In Nash-Finch Proceedings

This court has, over the past several decades, in a number of cases striven to delineate the borders of the public policy requiring that the National Labor Relations Act be administered primarily by the National Labor Relations Board. In general, this doctrine permits neither the federal nor the state courts to assert original jurisdiction over issues involved in a labor dispute which involve matters regulated by that federal Act. *Amalgamated Utility Workers* v. *Consolidated Edison Co. of N.Y.*, 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738 (1940); *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). But where the limits of preemption begin and end often presents troublesome issues.

Such issues of preemption have normally come up through the respective state court systems, and have reached this Court by appeal through the state system and by writ of certiorari from this Court to the state courts of last resort. The key preemption decisions have been made in cases reaching this Court through that course. *Hill* v. *Florida*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed.

1782 (1945) (cert. to the Supreme Court of Florida); *San Diego Unions* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959) (cert. to the Supreme Court of California); *Garner* v. *Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953) (cert. to the Supreme Court of Pennsylvania); *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955) (cert. to the Supreme Court of Missouri); *Teamsters Union* v. *Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed. 2d 312 (1959) (cert. to the Supreme Court of Ohio); *United Workers* v. *Laburnum Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954) (cert. to the Supreme Court of Virginia); *Machinists* v. *Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (1958) (cert. to the Dist. Ct. of Appeal of California, First Appellate District); *Plumbers' Union* v. *Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 (1963) (cert. to the Court of Civil Appeals of Texas); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971) (cert. to the Supreme Court of Idaho); *Machinists* v. *Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed. 2d 396 (1976) (cert. to the Supreme Court of Wisconsin); *Sears Roebuck and Co.* v. *Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed. 2d 209 (1978) (cert. to the Supreme Court of California); *Farmer* v. *Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977) (cert. to the Court of Appeal of California, Second Appellate District).

Only one such case appears to have reached this Court through the federal, rather than the state judiciary. *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed. 2d 582 (1966) (cert. to the United States Court of Appeals for the Sixth Circuit) was a libel suit brought in Federal

District Court because of diversity and hence came to this court through the federal court system.

Processing these issues through the state court judiciaries is an orderly method of proceeding. With virtually every judiciary facing overcrowded dockets, there is no reason to assume that the state courts will seek to add federally preempted issues to their respective case loads. The state courts have no overweening desire to decide matters concerning the interpretation of a law the details of which are usually unfamiliar to them. In a few cases they may err. Murky areas such as those involving conduct "arguably protected" by Section 7 or "arguably prohibited" by Section 8 of the National Labor Relations Act, for example, may prove troublesome. But when the NLRB becomes aware of what it regards as threatened impingement, it may, perhaps jointly with the Solicitor General, file *amicus* briefs or memoranda to assist in clarifying the issues. It has done so in such cases as *Garmon, Laburnum, Weber, Linn,* and others.

This Court has also held that in an urgent case the Board may proceed in Federal District Court to enjoin a state court action preempted by the Act despite the anti-injunction provisions of 28 U.S.C. §2283. *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971). Where prompt action is essential and/or when a state court has not given proper deference to the preemption doctrine and has entered an order which may interfere with effective regulation of labor disputes by the Board, this injunctive route is available. Wisely, the Board has used it sparingly, thus leaving essentially inviolate the separate and distinct areas of primary responsibility of the state and federal judiciaries.

C. The Mass Picketing And Trespass Issues In The Instant Case Involve Questions of Preemption Which Should Have Been Decided In The First Instance By The Arizona Courts

The state courts of Arizona, in the proceedings instituted by the employer here, would and should have been called upon to decide issues of preemption. The state court complaint here contained allegations relating to mass picketing, violence, and trespassing. These posed the kinds of issues which have been the subject of litigation in such cases as *Sears Roebuck and Co.* v. *Carpenters, supra* and in *NLRB* v. *Nash-Finch Co., supra.* There is no reason to believe that the Arizona court would not have exercised proper judicial discretion in dealing with such issues or that it would not have observed proper lines between state and federal areas of primary jurisdiction. If it did not, then the Board had the *Nash-Finch* procedures available to it, if it became necessary to correct the state judiciary and to protect employees' statutory rights. If, on the other hand, there were issues of trespass and violence which properly fall within the state court's sphere, then whether such local law was violated was a matter for state court decision.

Instead, before the state court had even been given an opportunity to determine either the preemption issue or the local law issues, the Administrative Law Judge leaped into the fray and attempted to preclude the employer from even arguing before the state court either the proper bounds of that court's jurisdiction or the merits of the local law issues. If Administrative Law Judges are allowed to exercise such authority, it is unlikely that cases such as *Sears Roebuck and Co.* v. *Carpenters, supra,* would ever reach this Court!

That, we respectfully submit, is not an orderly approach to the doctrine of preemption or of judicial separation. It has the effect of permitting the Board to arrogate to itself the authority to decide both preemption issues and local law issues in the first instance, rather than leaving them to be decided by the judicial systems best equipped to deal with them in an impartial fashion. To allow such matters be decided in the first instance by Administrative Law Judges and by the Board is not a healthy practice. No regulatory authority, including the NLRB, is immune from the temptation to expand its area of authority, not out of impure motives, but only because of a wholly predictable sense of regulatory mission.

There was no compelling reason here for the Administrative Law Judge to usurp the authority properly vested in the Arizona state courts by deciding whether or not there was "reasonable basis" for the employer to seek relief from alleged trespass, violence, mass picketing, and libel. Petitioner's suit nowhere questions or attacks the right of the employees to have free access to the Board's procedures. Neither should the Board seek to block the petitioner's access to the state court on non-preempted issues. As a majority of the Board held in *Clyde Taylor Company*, 127 NLRB 103, 109 (1960):

> ". . . the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than to condemn the exercise of such right as an unfair labor practice."

The Arizona state courts are, we submit, well qualified to decide whether there were aspects of the employees' conduct which were enjoinable under *Sears Roebuck*, or which might have justified the awarding of damages under

Laburnum. There is no reason to believe that the Arizona state court would not have observed proper jurisdictional and preemption lines, or that it would not have promptly dismissed the suit if the demonstration and picketing were shown to have come within the area of peaceful picketing exclusively regulated by the National Labor Relations Board and if the alleged libels failed the test of *Linn*. Indeed, after deliberation, the Arizona court vacated its temporary restraining order and refused to enter a preliminary injunction. Had the Arizona court entered any order which in the Board's view impinged upon an area reserved to the Board, as did the Nebraska court in the *Nash-Finch* case, the NLRB had available to it an expeditious route by which to seek to have any such order stayed.

But if, instead, there were areas, as in *Sears*, as to which the plaintiff-employer may have been entitled to a remedy before the state court, then the Administrative Law Judge of the National Labor Relations Board has no authority to preclude access to the only tribunals equipped to provide such a remedy—namely, the Arizona state courts. It is not sensible judicial administration to vest in an Administrative Law Judge employed by the National Labor Relations Board, the authority to decide either (a) whether the issues sought to be presented to state court are preempted, or (b) whether, if not preempted, the common or statutory law of the state of Arizona has or has not been violated, or (c) whether there is a colorable basis for such a common law or statutory claim under the law of the State of Arizona.

D. Primary Jurisdiction Over Clearly Non-Preempted Issues Should Be Left To State Courts, — With The Possible Exception Of Allegations Which In Essence Seek To Bar Access To Board Procedures by Claiming Abuse of the Board's Own Processes.

This Court has held that fundamental principles "require us not to find withdrawal from the States of power to regulate where the activity regulated was *a merely peripheral concern* of the Labor Management Relations Act." *San Diego Unions* v. *Garmon*, 359 U.S. 236, 243, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959). In *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed. 2d 582 (1966), this Court made clear that state courts continue to have jurisdiction to apply state common law to defamatory conduct, even though such defamation occurs in the context of labor relations normally governed by the National Labor Relations Act.

At the same time this Court devised certain safeguards and limited the role of state courts to remedying malicious libel—i.e. those cases where the defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity and where there was proof of actual damage. It can hardly be open to dispute, however, that the Court in the *Linn* case intended the state court to have original jurisdiction to determine whether the libel alleged in any given case is of the malicious kind falling within the permissible limits of state action. Surely there is no room in that decision for any suggestion that such determinations were intended to fall within the primary jurisdiction of the National Labor Relations Board, an agency with virtually no expertise in the law of libel. Yet that is precisely the impact of the decision here before this Court for review.

It would seem reasonable that in areas of primary and traditionally local concern, both because of the states' interest in such matters as the maintenance of domestic peace and because the federal interest in such matters is only peripheral, the National Labor Relations Board ought not attempt to preclude the state judiciary from deciding issues brought to it by its citizens.

That, indeed, seemed to be the initial approach of the Board, although the Board discussed it without so specific a reference to preempted or non-preempted issues. *Clyde Taylor,* 127 NLRB 103 (1960).

Commencing, however, with *Power Systems, Inc.,* 239 NLRB 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979), the NLRB embarked upon a new and questionable practice of attempting to preclude employer and/or union access to the state courts if resort to the state courts appeared to the Board to be for the purpose of penalizing an employee for filing a charge with the Board. Id. at 450. The Board has also sought to preclude access to the state courts if the object of the litigation is in itself unlawful, such as the enforcement of a hot cargo or invalid union security clause. *United Stanford Emp., Etc.,* 232 NLRB 326 (1977), enforced 601 F.2d 980 (9th Cir. 1979); *Television Wisconsin Inc.,* 224 NLRB 722 (1976).

The NLRB has also attempted to preclude access to the state courts when the state court suit was found to attack the very basis of the charge being determined by the Board or the basis for a contempt proceeding instituted by the Board. *George A. Angle,* 242 NLRB 744, enforced 683 F.2d 1296 (10th Cir. 1982). See also *Sheet Metal Workers Local 355,* 254 NLRB 773 (1981). To the same effect is *The United Credit Bureau of America, Inc.,* 242 NLRB 921

(1979), enforced 643 F.2d 1017 (4th Cir. 1981), cert. denied ..... U.S. ....., 102 S.Ct. 539, 70 L.Ed. 2d 404 (1981) (Rehnquist, J. dissenting in a written opinion).

In the *United Credit* case, the employer had sued the employee in a fraud action, alleging that the employee had provoked her own discharge so that she could file an unfair labor practice charge in the expectation that the employer would offer a settlement which would amount to a "paid vacation." The complaint alleged that her entire course of conduct was an effort by the employee to obtain the benefits of the employer's training program although she had no intention of remaining a *bona fide* employee. The court and the Board characterized the employer's action as analagous to an action for abuse of process. Essential to the alleged fraudulent scheme was provocation of her discharge by engaging in arguably protected activities and her resort to the NLRB for appropriate relief. Thus, said the court, the employer had "inexplicably wedded its fraud action to the operation of the Board's processes." In discussing the matter of the appropriate forum under these circumstances, the court concluded (p. 1026):

> "In cases of the class before us — employers' civil actions against employees, in the nature of abuse of process and factually based upon the employee's filing of unfair labor practice charges with the Board — all factors require resolution of the employee's unfair labor practice claims in the first instance by the Board. We believe that the Board is uniquely positioned to determine fairly and with presumed expertise whether Anderson was engaged in protected lawful activity, or whether she was abusing the Board's processes as alleged."

This Court denied certiorari in that case, with Justice Rehnquist dissenting.

Power Systems, Inc., supra was the first case in which the Board began carving out exceptions to the *Clyde Taylor* doctrine. The above quoted rationale of the Fourth Circuit in *United Credit* probably tacitly underlay the Board decision and the court's approval there. In that case the employer had sued the employee for malicious prosecution on the grounds that the employee had repeatedly filed groundless charges against the employer. The Board there found that the employer's civil action was baseless and had been brought in order to "pursue an unlawful objective of penalizing" the employee for filing an NLRB charge. The court denied enforcement on the ground that the Board's conclusion that the civil action was baseless was not supported by substantial evidence.

Similarly in *George A. Angle, supra,* the Court of Appeals found it appropriate to enforce a Board order prohibiting the pursuit of a state court malicious prosecution suit. The court there did not make specific mention of the Board's presumed expertise to decide abuse of process questions involving its own processes, although such rationale would have had equal application there. While the Court's decision offers only minimal analysis of the basic issues we have been discussing, it emphasized in footnote 2 at page 1300, "the congressional intent that employees enjoy 'complete freedom' to report unlawful conduct to the Board," and found that such a policy would be "ill-served by a policy that permitted a civil action to proceed to resolution before the Board could determine that the action violated the Act and order appropriate relief."

Because these cases involve non-preempted areas of state law, it would seem the more orderly course to permit the state court to decide such non-preempted issues (malicious prosecution in *Power Systems* and *George A. Angle,* fraud in *United Credit*). Yet it appears that this Court, by denying certiorari in *United Credit,* has accepted the rationale that state court actions challenging the legitimacy of the employee's or union's charges filed with the NLRB pose, essentially, questions of alleged abuse of NLRB processes. In this limited area, apparently this Court is willing to presume that the NLRB has unique expertise. And it may be sound federal labor policy to permit the Board to keep primary jurisdiction over reviewing the basis of the charge, rather than to allow a state court to make a decision which could preclude or discourage the employee from invoking Board processes at all. There is at least an arguable reason in such cases to allow the NLRB to make the initial decision as to whether the state court is being used without reasonable basis as a means of denying access by employees to the Board's processes.

We believe the better doctrine would have been to keep the NLRB completely out of the area of determining whether the parties should have access to the state's judicial processes, as Justice Rehnquist opined in his dissent in the *United Credit* case.

But if there is to be this one exception to the rule that non-preempted issues are best left to state courts for determination, let that exception be finely drawn and narrowly construed. Such an exception would not permit the Board to attempt, as it did here, to deny access by the employer-plaintiff to a state court for determination of a

libel issue. An Administrative Law Judge should not be authorized to decide whether or not there was a colorable or *prima facie* basis for a libel suit of the non-preempted *Linn* variety. That is a decision for the state courts to make, not the Board. Parties should be allowed to seek a decision in the judiciary best equipped to decide such issues of local law. That judiciary is the Arizona courts, not an administrative agency charged with administering the nation's labor laws.

E. Effective Judicial Administration Will Not Be Well Served If The Board Is Permitted To Attempt To Impede Access To State Judiciaries

As a matter of practicality, as well as principle, it makes little sense to permit the National Labor Relations Board to attempt to deny any party access to state courts. The result of so doing would be only to create uncertainty for long periods of time.

As this Court well knows, the Congress has provided a three step decision making process for the interpretation and enforcement of the National Labor Relations Act. The statute requires that an unfair labor practice proceeding be decided in the first instance by an Administrative Law Judge, who has authority only to enter a recommended order. That order is then subject to review by the Board, but the Board's order is also not self-enforcing. Only when a United States Court of Appeals enforces the Board's order is there a final decision with teeth in it.

This rather tentative enforcement process results in substantial delays. The median time from the filing of a charge to the issuance of an NLRB decision was 429 days

in 1978, and 483 days in 1979. Miller, *An Administrative Appraisal Of The NLRB*, Table 4, p. 146, published by the University of Pennsylvania (Revised Edition 1980). The time from Board decision to court order varies, of course, with the complexity of the case, but on the average takes approximately a year after the Board commences its enforcement proceeding (*Id.* page 103).

If, therefore, the Board's General Counsel accuses a respondent employer of commiting an 8(a)(1) violation by having filed suit against an employee or a union in a state court, there will be no enforceable decision with respect to that accusation for over two years. Meanwhile, the state court action may well have proceeded to a conclusion, and a state court judgment enforceable in that judicial system may well have been entered.

In the instant case the court action was commenced by the employer on September 25, 1978. The Court of Appeals decision in the Ninth Circuit was handed down on November 12, 1981—over three years later. If a state court suit is improper because it is within an area of law which has been federally preempted, or if the state court action has denied the state court defendant access to Board processes, then surely it is not effective judicial administration to have such an important matter remain in limbo for a period of some two to three years, during which time the state court may have proceeded to final judgment.

It seems obvious that it is much more appropriate to have questions of preemption or of misuse of state court processes be litigated in the state court proceedings, either by the parties themselves or, if necessary, with the assistance of NLRB intervention either as a party or as a

friend of the court. Such a procedure assures that alleged limitations on the state courts' jurisdiction may be raised before the court reaches its decision.

In extreme cases a state court order may also be subject to stay through the Board's utilization of the federal court's injunctive powers as authorized by this Court in *Nash-Finch*. That, too, unlike the Board's procedures, offers a timely and effective means of preventing unwarranted state action in an appropriate case.

To permit such issues to drag through the NLRB's slow and tentative multi-step decision-making procedures, however, is not merely disruptive of the appropriate distribution of judicial powers, as we have pointed out in earlier sections of this brief. It is also highly ineffective judicial administration. In cases where prompt action is necessary in order that a state not intrude improperly into a federally regulated area, there are better means available than an attempted utilization of the labor act's cumbersome unfair labor practice remedial machinery.

CONCLUSION

The Board's order enforced here by the Ninth Circuit Court of Appeals exceeds the permissible bounds of attempted administrative interference with free access to the state courts of Arizona. Those courts, not a federal regulatory agency, must be left with original jurisdiction to decide issues of trespass, violence, mass picketing, and malicious libel. The Board's order requiring petitioner

to withdraw its suit in the Superior Court of the State of Arizona should be denied enforcement.

Respectfully submitted,

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December, 1982